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DISCRIMINATION UPDATE

The judgments of three interesting cases on equality have been issued this month. This bulletin explores the decisions and considers their implications for institutions.

1. **Disability discrimination - definition of disability-related discrimination**

The definition of disability-related discrimination in the Disability Discrimination Act 1995 (DDA) is ambiguous and has always presented a nagging problem for lawyers. An institution discriminates against a disabled person:

"if for a reason relating to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply and it cannot show that the treatment in question is justified."

That definition is formulated differently from the definition relating to the other forms of unlawful discrimination.

Until recently, the leading authority on the interpretation of the definition was a court of appeal case in the context of employment (***Clark v Novacold*** - concerning an employee who took a year off work as a result of a disability). The court identified those "others" with whom the treatment of the disabled person is to be compared with as persons who do not supply the employer with the same reason for the employer acting as they did i.e. an employee who did not have a year off work. This is the approach adopted by the former Disability Rights Commission (now the Commission for Equality and Human Rights) in its Code of Practice for HE and FE ("the Code of Practice")

In effect, this interpretation meant that the comparison test was always met and a conclusion of less favourable treatment was inevitable. The challenge for an institution was then to seek to justify the treatment in accordance with the requirements of the DDA (i.e. to show that the reason for the less favourable treatment was material to the circumstances of the particular case and substantial).

A further consequence of this interpretation was that it was not necessary for the institution to know that the individual was disabled in order to engage in unlawful disability-related discrimination, a point also stated at paragraph 6.11 of the Code of Practice. It is difficult to reconcile this principle with a common sense and meaningful comparison between treatment that is discriminatory and treatment that is not.

Nevertheless, the above approach was deemed to reflect the intention of Parliament, which was not simply to ensure that disabled people were treated in the same way as non-disabled people in the same situation. Rather the view was until now that the definition of disability-related discrimination required that special consideration should be given to the needs of disabled people so that they are treated more favourably than non-disabled people, justifying the comparison test that always yielded a conclusion of less favourable treatment.

The decision published this month by the House of Lords in the case of the ***London Borough of Lewisham v Malcolm*** ruled that the court of appeal interpretation in ***Clark v Novacold*** is incorrect.

The ***Malcolm*** case concerned a tenant of a council flat who suffered from schizophrenia and who, in breach of his tenancy agreement, sub-let his flat, thereby entitling the Council to repossession of the premises.

The majority of the judges concluded that the definition of disability-related discrimination is not about disability per se; it is about unjustified less favourable treatment for a reason which relates to the disabled person's disability. Therefore it could not be right to interpret it in a way that the requirement to show less favourable treatment would always, by definition, be satisfied. The appropriate "others" (i.e. comparators) therefore are not persons who have not sub-let their flats in breach of their tenancy

agreements; they are persons who do not have a mental disability, but who have sub-let their premises in breach of their tenancy agreements. The judges found that such persons would have been treated in exactly the same way by the Council and hence, the repossession proceedings did not amount to less favourable treatment. It was not necessary for the Council to advance any justification for its actions. The majority of the judges also concluded that treatment cannot be discriminatory unless the discriminator knows of the disability.

This is a much narrower interpretation of disability-related discrimination than the one that prevailed up until now. However, it does not displace the view of Parliament that the needs of disabled people are different and sometimes need to be met by positive action. This is achieved under the DDA by requiring reasonable adjustments to be made to prevent disabled people suffering substantial disadvantage.

The implication of this ruling for institutions is that it will from now on be much more difficult for students to succeed in claims for disability-related discrimination. Institutions will still have to guard against making stereotypical assumptions about disability (direct discrimination) and will have to consider reasonable adjustments. However, if an institution can demonstrate that it would treat any non-disabled student in the same way as it treated the disabled student who is bringing the claim, it will not amount to less favourable treatment and the institution will be relieved of the additional burden and expense of seeking to justify its conduct. This will be good news generally for institutions and of particular benefit in cases of disruptive behaviour in the circumstances of students with mental health problems, and in cases of severe learning difficulties.

2. Disability discrimination - carers of disabled people

On 17 July, the European Court of Justice (ECJ) issued its conclusions on the case of Sharon Coleman, an employee who was the principal carer for her disabled son (Coleman v Attridge Law). The issue for consideration was whether the prohibition of discrimination contained in the EU directive on equal treatment covers cases where an employee is treated less favourably than her colleagues because, although not herself disabled, she is associated with a disabled person. The ECJ concluded that that it did, because the purpose of the directive was to combat all forms of discrimination and therefore it applies not to a particular category of person, but by reference to the nature of the discrimination. An interpretation limiting its application only to people who are themselves disabled is liable to deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

This widens the scope of the DDA and the implications are likely to be that institutions will not only have to take into account the rights of their disabled students, but also, students who are carers of disabled people. However, in keeping with the views of the House of Lords in the Malcolm case above, an institution would have to have knowledge of the person's role as carer in order to engage in disability-related discrimination.

3. Discriminatory advertising

On 10 July 2008, the European Court of Justice ruled that discriminatory job advertisements amount to direct discrimination. Consequently, a public statement by a Belgian company that it did not employ immigrants because its clients did not like dealing with them was capable of amounting to direct discrimination on the grounds of race, notwithstanding that there was no identifiable victim of discrimination. The statement gave rise to a presumption of a discriminatory recruitment policy and it was for the employer to prove that its actual recruitment practice did not did not correspond to those statements. Sanctions such as declarations of discriminatory practices, injunctions or fines, therefore, may be imposed on any institution who cannot adduce such proof. The case was considered in the context of race discrimination and the EU directive requiring member states to enact race discrimination legislation. However, the implications of that case are likely to extend beyond race discrimination to other forms of unlawful discrimination. Institutions should therefore be careful, in particular in relation to disability, that statements made in prospectuses and other documents are not capable of being construed as indicating the existence of a discriminatory recruitment policy with regard to students or staff.

This Bulletin aims to introduce you to legal issues of concern to managers in education. It is not a substitute for taking appropriate specialist advice in individual cases. This bulletin may be photocopied for the use of colleagues within your institution. An electronic version is also available on our dedicated education portal: www.educationsolutionsonline.co.uk

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